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FEW parties appear before such administrative agencies as the Securities and Exchange Commission or the Interstate Commerce Commission without the assistance of counsel. In contrast, claimants seeking social security pension benefits, veterans' pensions, unemployment insurance benefits, and supplemental social security income benefits rarely avail themselves of legal representation. For example, only 5 percent of all social security claimants are represented by attorneys during the administrative stages of the proceedings.[1] As a result, relatively few attorneys are active in the field, even though this nonbusiness side of administrative advocacy affects the average American as much as our judicial system. The problem of nonrepresentation of claimants in nonbusiness administrative proceedings is exacerbated by restrictive laws which have greatly limited the economic incentive to practice in this area of administrative law.[2] Although such legislation was originally passed to protect the claimant from the overreaching attorney, the actual effect of these laws has been to preclude all legal representation, with a resulting loss to the claimant of a necessary ally in the administrative proceeding.

Since the poor form the bulk of those seeking governmental benefits, limitations on access to attorneys create barriers to effective representation of those on the lower end of the economic scale. At a time when differences in the legal rights of the wealthy and the poor are

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1. Yarowsky, *Attorneys' Fees in Social Security Proceedings*, 17 U. KANS. L. REV. 79 (1968).

2. See text accompanying notes 25-49 *infra*.

theoretically at a minimum, the cost of an attorney should be an unimportant factor in obtaining equal representation. Nevertheless, statutory restrictions on attorneys' fees discourage professional practice and intensify the relative inability of the poor to obtain counsel.

In almost every other area of the law, attorneys may freely contract with clients; only in the case of governmental benefit or insurance programs has the client's need for protection from attorneys been accorded statutory recognition. Yet protecting clients from attorneys, by effectively prohibiting attorney representation, is a far-reaching prophylactic measure which overlooks both the advocacy nature of administrative proceedings and the expertise which agencies can bring to bear in support of their positions. This unfortunate exclusion of attorneys is caused by a failure to recognize that law is a business which will be practiced only if a profit can be made.

The Attorney's Role in Administrative Actions

An Overview

The right to litigate is not meaningful without the right to counsel, and the right to counsel presupposes the practical ability to obtain counsel. Absent that practical ability, the rights to counsel and to redress are without substance. Nonetheless, surveys have shown that low income persons generally do not feel a need for legal representation in noncommercial administrative proceedings. Because the community is seen as not having developed a clear way of dealing with administrative problems,[3] the poor tend to adopt a passive approach to the administrative process which results in a very conservative use of legal resources.[4]

3. B. CURRAN, F. HECHT, D. MADDI & F. MARKS, UTILIZATION OF LEGAL SERVICES BY THE POOR 41 (American Bar Foundation Series Pamphlet 1971); F. MARKS, THE LEGAL NEEDS OF THE POOR 7 (American Bar Foundation Series Pamphlet, Limited Circulation Draft 1971).

4. B. CURRAN, F. HECHT, D. MADDI & F. MARKS, UTILIZATION OF LEGAL SERVICES BY THE POOR 47 (American Bar Foundation Series Pamphlet, Limited Circulation Draft 1971). Studies demonstrate that 83% of those with incomes over $15,000 have sought the advice of an attorney sometime during their lives, while only 56% of those with incomes below $7,000 have done so. *Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 4 (1973) (statement of Senator Tunney) [hereinafter cited as *Hearings on Legal Fees*].

The problem of nonrepresentation of the poor has been squarely addressed by Senator John V. Tunney of California: "In a government of laws, all citizens have a legal right to redress of grievances and injustices. Crucial to the process of redress is the lawyer. Yet, too often, citizens, untrained in law, fail to perceive what their rights and remedies are. Too often they feel baffled by the complex maze of institutions and regulations that surround them. Too often lawyers are unavailable to help citizens at rates

The need for counsel in any society depends largely on the economic consequences of legal action. For example, our society has determined that because of the great social and economic consequences which befall a convicted criminal, no one should be convicted of a crime without having an advocate on his side, even when counsel must be provided at society's expense. While the stakes in governmental benefit claims do not reach the proportions involved in criminal convictions, they are clearly sufficient to warrant legal representation.

Although there are exceptions, such as claims involving the extent of benefits, in practice, most unemployment, social security, or veterans' cases turn on the basic question of entitlement. For example, a significant number of social security claims involve the right to total and permanent disability benefits.[5] The average disability claimant, in the author's experience,[6] is fifty years of age and receives an award in excess of $200 monthly. Thus, the average amount at stake is $31,200—the amount that would accrue, exclusive of interest, between age fifty and age sixty-two, at which time the claimant would be eligible for reduced old-age benefits. Many claimants, however, are as young as thirty years of age, in which case the stake may be as high as $80,200. Moreover, disability awards do not include medical or dependents' benefits,[7] which may amount to thousands of dollars. The amount involved in a veterans' or supplemental security income claim parallels social security awards, and, even in the case of unemployment insurance benefits, a typical California claim may amount to over $2,000.[8]

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they can afford.

"The result: The erosion of basic constitutional and other legal rights; an imbalance of advocacy in our legislative forums; a loss of faith in our governmental processes." *Id.* at 1.

5. *See* Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681, 683-86 [hereinafter cited as Dixon].

6. The author has had extensive experience litigating governmental benefit claims. From 1967 to 1969, he was associated with the Legal Aid Foundation of Los Angeles, first in the capacity of staff attorney, and later as Director of Major Case Developments. Between 1969 and 1974, the author was in private practice in Los Angeles, during which time he represented clients in administrative proceedings, primarily those involving Social Security claims.

7. *See* 42 U.S.C. §§ 402 (dependents' benefits), 426, 1395c-9pp (Medicare benefits) (Supp. III, 1973).

8. In California, the maximum weekly claim, calculated on the basis of past earnings, is $90. CAL. UNEMP. INS. CODE § 1280 (West Supp. 1974). Since these benefits may be received for 26 weeks, the maximum amount which may be claimed would be $2,340. *Id.* § 1281(b) (West 1972). In times of prolonged statewide unemployment, however, federal and state laws provide for an extension of the period during which benefits may be received. *See* Pub. L. No. 93-373, §§ 202(a)(1)-401 (Aug. 10, 1970); CAL. UNEMP. INS. CODE § 3501 (West 1972).

Considering that social security or unemployment insurance benefits may constitute a claimant's only source of future income, aside from general relief funds, these claims are of paramount importance. Since general relief funds in Los Angeles County, for example, usually pay no more than $86 per month for a single person,[9] the ability to litigate successfully involves the question of survival itself.

The necessity for effective representation is magnified by the volume of nonbusiness administrative claims. More than nine hundred thousand social security disability claims are filed annually, and nearly 50 percent of these claims are denied on initial application.[10] Some fifty thousand denials of social security claims occur every month.[11] Denials of veterans' claims exceed twenty thousand each year.[12] In California, well over one hundred thousand unemployment insurance claims are filed monthly, and a large percentage of these are denied.[13] These figures clearly demonstrate the need not merely for attorneys, but for attorney specialists, particularly in light of the complexity of the administrative process.

The Claimant Versus the Agency: The Need for an Advocate

Administrative claims involve issues as complicated as other matters in which attorneys are customarily involved. A social security claim may go through as many as four administrative stages: application, reconsideration, hearing, and appeal.[14] When the administrative decision is finalized, recourse is available in the federal courts.[15] Although the potential harm in proceeding without counsel at the initial application and reconsideration levels might be slight, the procedural complexity of the hearing stage does warrant legal representation. The hearing is a trial-type proceeding, demanding all the traditional

9. CALIF. DEP'T OF SOCIAL WELFARE, AR 1-15, PUBLIC WELFARE IN CALIFORNIA (1972-73) (Table 23).

10. Dixon, *supra* note 5, at 683.

11. Yarowsky, *Attorneys' Fees in Social Security Proceedings*, 17 U. KANS. L. REV. 79 (1968).

12. *Hearings on Legal Fees, supra* note 4, at 515 (statement of Raymond T. Bonner).

13. In November 1973, for example, 195,125 initial claims were received. U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE STATISTICS 1 (Mar.-Apr. 1974). For the year 1973, there were 358,331 total denials. *Id.* at 21.

14. *See* 20 C.F.R. §§ 404.905, .909-.910, .917, .939-.942 (1974). When review of a determination made subsequent to a hearing is sought by a party, the Appeals Council has the power to deny the request for review. *Id.* § 404.947.

15. 42 U.S.C. § 405(g) (Supp. II, 1972).

skills of an attorney: examination of witnesses (including experts), preparation of documentary evidence, and presentation of legal precedents and other bases for decision.[16] Moreover, the appeals stage, initiated by a request for review by the Appeals Council[17] normally requires extensive written briefs[18] analyzing intricate medical data. Finally, if judicial review is allowed, the claimant proceeds in the United States District Court, a forum which, with its formal rules and procedures, is clearly no place for a novice.

Challenging Expert Testimony

Most claims for social security, supplemental income, and veterans' benefits involve the determination of disabilities with respect to which medical science is extremely inexact. Were the determination of disability to consist merely of an evaluation of the individual claimant against an objective standard, it is possible that attorneys would not be necessary; however, the statutes wisely call for subjective assessment of whether the particular individual can or cannot work.[19] Questions concerning the individual's motivation, his capacity for rehabilitation, and his ability to obtain and hold work are inevitably involved. Since disability usually results from more than one impairment, a simplistic system for measuring disability is impractical.[20]

In a personal injury or workmen's compensation case, litigants resort to attorneys in part because they are aware that legitimate medical evaluations may differ from doctor to doctor. Although both sides may concur on the issue of liability, a trial may be necessary to determine the extent of medical impairment. In such trials, our system of justice requires that the trier of fact determine which doctor has the best command of the facts and the best reasons for his evaluations.

These considerations, inherent in any adversary context involving use of expert testimony, apply to administrative claims as well. Yet the average person requesting social security, veterans', or supplemental income benefits, with a high school education and a work his-

16. *See* 20 C.F.R. §§ 404.927-.930 (1974) (conduct of hearing).

17. *Id.* § 404.946; Dixon, *supra* note 5, at 698-99.

18. *See* 20 C.F.R. §§ 404.948-.949 (1974).

19. *See, e.g.*, 42 U.S.C. § 423(d) (1970); CAL. UNEMP. INS. CODE § 2626 (West 1972). *See also* Townend v. Cohen, 296 F. Supp. 789, 791 (W.D. Pa. 1969).

20. With respect to veterans' claims, where representation of a claimant is, in effect, prohibited, the need for attorneys is perhaps the greatest, for the problem of determining liability is uniquely difficult. Not only are the stakes high, but also such claims frequently involve an assessment of the percentage of disability caused by a service-related illness or injury. Intricate factual determinations are thus involved.

tory in unskilled or semiskilled labor, is no match for the medical and vocational experts called by the administrative agency. Although the expert opinion is neutral, and may be favorable to the claimant, the expertise needed to recognize and emphasize such testimony is beyond the layman's capability: the applicant simply does not know how to bring out favorable aspects of expert testimony. This factor is particularly critical in cases where there are no objective signs of disability, such as when pain is of hysterical or psychogenic origin, or when x-rays and other tests are inconclusive. This lack of supporting objective evidence creates a predisposition to disbelieve the claimant representing himself. An attorney, therefore, is essential for effective challenge of agency findings.

The author has been involved in several cases in which advisors to the agency testified that there was no objective disability, even though the claimant was in a wheelchair and unable to work. Although such testimony was ultimately disregarded, the extent of cross-examination necessary to reveal the inaccuracy and inadequacy of the testimony would have been beyond the capabilities of the average claimant or paraprofessional.

An attorney is necessary not only to contest the positions taken by agency experts, but also to provide access to independent doctors who can provide a more favorable diagnosis. The claimant needs doctors who will seek to verify the symptoms rather than to disprove them, assuming an impairment truly exists. Frequently, the reason for denial of governmental benefits is the agency's use of a doctor who lacks expertise in the appropriate field. An attorney experienced in litigating these matters can ensure that appropriate expert testimony is obtained.

In addition, claimants generally cannot afford the best medical attention. The claimant without an attorney is at the mercy of his local doctor who often lacks the time or desire to write a detailed medical evaluation. Local physicians' reports may be conclusory, unconvincing, or unintelligible. In contrast, physicians used by the agency are trained to write reports which appear comprehensive. One may find, however, that what appears to be a detailed report is actually a stock letter, based only on a cursory check-up, which bears little relationship to the claimant's situation. The attorney, then, is also needed to make certain that the agency's doctors have taken the time to evaluate thoroughly the claimant's complaints and symptoms.

Investigatory Functions

The hearing, the most important stage of any administrative pro-

ceeding, provides the primary opportunity for the claimant to present evidence.[21] Here, an attorney's knowledge and experience can be essential to a successful outcome. Investigation is ordinarily beyond the resources of the average claimant, and inadequate factual investigation is often the principal reason for appellate reversal. Frequently, the claimant suffers from symptoms, but the perceptible signs of disease do not appear by the date of the hearing. Proper inquiry by an attorney in such a case can lay the groundwork for a later reopening of the administrative claim when objective evidence of disability finally appears. In other cases, the claimant acts as his own enemy in presenting his claim. By failing to bring out symptoms which are embarrassing, or by exaggerating irrelevant symptoms to substantiate a claim, a disabled person, without benefit of counsel, may appear to lack credibility.

Although unemployment insurance cases involve little expert testimony, the unemployed worker whose claim has been denied at initial application usually faces determined opposition. The employer, having a truly adverse interest, may use either attorneys or experienced lay representatives to defeat unemployment insurance claims. These claims often involve issues of credibility. For example, the employer may claim that the worker walked off the job, while the worker maintains that he was fired; or the workers may assert that he accidently damaged merchandise, while the employer claims the act was deliberate. Cross-examination is vital in these cases.

In the typical case, the employer's witnesses are the employee's supervisors, who are, quite often, more educated, more sophisticated, and better prepared than the claimant. In short, they make more favorable impressions as witnesses. The employee who represents himself often cannot effectively present his case; for example, subpoenaing witnesses or cross-examining supervisors is beyond the average claimant's capabilities. Moreover, as is true of all noncommercial administrative cases, the administrative judge is seldom able to bridge the gap between deciding the facts and investigating the truth. Compromising primarily because of a heavy hearing schedule, the judge is likely to act more in a traditional judicial role. The result is that the claimant's

21. The claimant must, of course, submit evidence of entitlement to benefits upon initial application, if requested by the administration. 20 C.F.R. § 404.905 (1974). At the hearing, however, the claimant for the first time is able to offer witnesses, including experts, to produce documentary evidence, and thus to explain his case to the hearing examiner in a more formal manner. *See id.* §§ 404.927, .934.

version of the facts is not investigated thoroughly, unless the claimant has an advocate.

Attorneys have been shown to have a dramatic impact upon nonbusiness administrative claims. In social security proceedings, for example, despite the four-step administrative process, agency decisions are regularly reversed by the federal courts.[22] Statistics for the years 1960 through 1970 show that hearing examiners reversed 38 percent of the cases that came before them; when an attorney was involved, the reversal rate climbed to 54 percent. This percentage was even higher when the attorney presented expert witnesses.[23]

In summary, attorneys are needed in nonbusiness administrative actions, because the stakes are high and claims are settled through an adversary system. The claimant must have someone who can obtain and evaluate favorable evidence and counter the effect of unfavorable evidence. The present inability of most claimants to obtain effective representation conflicts with current notions of justice, particularly since decisions in this area determine eligibility for benefits necessary to basic subsistence.[24]

Statutory Limits on Attorneys' Fees

Restraints on access to attorneys are due in large measure to statutory limits on attorney compensation in nonbusiness administrative proceedings. Such limitations are illustrated by statutory provisions gov-

22. A study by District Court Judge Feinberg noted that in volumes 227 to 236 of the Federal Supplement, decisions by the secretary of the Social Security Administration were reversed or remanded 47 times and upheld only 27 times. Scott v. Celebrezze, 241 F. Supp. 733, 736 n.21 (S.D.N.Y. 1965). In a similar review of reported cases over a three month period, District Court Judge Higginbotham observed that the government was reversed 75% of the time. Seldomridge v. Celebrezze, 238 F. Supp. 610, 620 n.17 (E.D. Pa. 1964). *See also* Floyd v. Finch, 441 F.2d 73, 77 (6th Cir. 1971) (McAllister, J., dissenting).

23. Dixon, *supra* note 5, at 718, 721 & n.191. Mr. Dixon suggests that since the merit of the application is initially determined by medical experts, the reversal rate may be due largely to the inexpertness of hearing examiners (*id.* at 718), who generally have a legal, not a medical, background. Mr. Dixon, however, fails to recognize that the hearing represents the claimant's first face-to-face confrontation with the trier of fact during which the combined effect of several impairments may be recognized for the first time. In addition, particularly if counsel appears to aid in the presentation of the facts, consultative examinations for inadequately diagnosed or undisclosed impairments are often made. Finally, true disability often may not become apparent until this time. Thus, it is not surprising that there exists a high reversal rate; indeed, increased representation of claimants would lead to a dramatically higher reversal rate.

24. The Supreme Court has recently noted that governmental benefits essential to basic sustenance are of greater constitutional significance than are other forms of entitlements. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 259 (1974).

erning claims involving veterans' benefits, unemployment insurance, welfare benefits, and social security compensation. These statutory schemes illustrate different attitudes toward the attorney-client relationship, ranging from suspicion on the part of the Veterans Administration to openness on the part of those who administer unemployment compensation. In all of the statutory schemes, however, there is a failure to recognize the legal profession as a business in which attorneys need protection from clients as much as clients need protection from attorneys. It is enlightening, however, to contrast these statutory schemes with workmen's compensation proceedings, in which attorneys participate as a rule rather than as an exception.

1. *Veterans' Benefits.* The Veterans' Act of July 14, 1862, limited attorneys to fees of five dollars for representing or assisting veterans.[25] In 1864, the maximum fee was magnanimously raised to ten dollars;[26] although the upper limit has not remained constant, the current ceiling is that of the Civil War period.[27] In addition any person who "solicits, contracts for, charges, or receives" fees in violation of the statutory maximum is subject to a five hundred dollar fine or two years imprisonment at hard labor or both.[28]

As recently as 1971, a court of appeals stated: "The ten dollar limitation statute was enacted to protect just claimants from improvident bargains and to prevent unjust claims."[29] A more sympathetic court declared that "[ten dollars] today can scarcely compensate the attorney for getting his automobile out of the parking lot and starting for the government bureau and parking it again at the place where he must perform his legal ministrations."[30] Nonetheless, the law restricting

25. Act of July 14, 1862, ch. 166, § 6, 12 Stat. 568.

26. Act of July 4, 1864, ch. 247, § 12, 13 Stat. 389. For a chronological history of the statutory changes with respect to attorney fees for representing veterans, see *Hearings on Legal Fees, supra* note 4, at 458-59 (statement of John J. Corcoran, General Counsel, Veterans' Administration).

27. *See* 38 U.S.C. § 3404(c) (1970). This section provides: "The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees . . . shall not exceed $10 with respect to any one claim . . . ."

The maximum permissible fee has not always remained constant since 1864; it often vacillated with the type of benefit the veteran was claiming. Since 1924, however, the ten dollar maximum has applied to all attorney fees for representation of veterans. Act of June 29, 1936, ch. 867, § 201, 49 Stat. 2032; Act of March 4, 1925, ch. 553, § 17, 43 Stat. 1311; Act of June 7, 1924, ch. 320, § 500, 43 Stat. 628.

28. 38 U.S.C. § 3405 (1970).

29. Hoffmaster v. Veterans Admin., 444 F.2d 192, 193 (3d Cir. 1971).

30. *In re* Descamp's Estate, 405 Pa. 331, 338, 175 A.2d 827, 830-31 (1961).

attorney fees is still very much in effect.[31]

2. *Unemployment Insurance.* Unemployment insurance statutes, on the other hand, do not restrict the attorney-client agreement, but unemployment insurance proceeds are exempt from the claims of the employee's creditors including the claimant's attorney.[32] In California, the unemployment insurance litigant must pay his own fees at administrative and court levels, regardless of the outcome.[33] In some states, the agency is required to pay a specified amount to the attorney who represents a successful claimant at the court level.[34] Only Nebraska allows the agency to pay an attorney who represents a successful claimant at the administrative level.[35]

3. *Welfare Claims.* Attorneys for successful claimants in welfare cases in California may be awarded fees for representation at the court level only.[36] In Los Angeles County, where the author has litigated numerous welfare claims, fees tend to be awarded at a reasonable

31. *See* Hines v. Lowrey, 305 U.S. 85 (1938); Gostovich v. Valore, 153 F. Supp. 826 (W.D. Pa. 1957); *Hearings on Legal Fees, supra* note 4, at 512 (statement of Raymond T. Bonner).

32. *See, e.g.*, CAL. UNEMP. INS. CODE § 988 (West 1972); N.Y. LABOR LAW § 595 (McKinney 1965); WASH. REV. CODE ANN. § 49.48.090 (1962).

33. *See* CAL. UNEMP. INS. CODE § 1958 (West 1972). Costs may be awarded if an employer has acted in bad faith.

34. Bellar, *Claimant Representation in UI Adjudication Proceedings*, UNEMPLOYMENT INS. REV., Jan. 1968, at 1, 5 [hereinafter cited as Bellar]; *see, e.g.*, ALASKA STAT. § 23.20.470(b) (1972); 15 FLA. STAT. § 443.16(2) (1966 & Supp. 1974-75); ME. REV. STAT. ANN. tit. 26, § 1044(2) (Supp. 1973-74); NEB. REV. STAT. § 48-646 (1968); N.Y. LABOR LAW § 538 (McKinney 1965); R.I. GEN. LAWS ANN. § 44-57(c) (1969); WASH. REV. CODE ANN. § 50.32.160 (Supp. 1974); P.R. LAWS ANN. tit. 29, § 706(n) (1966).

An indication of the importance of such statutes to the proper representation of claimants can be found in Waite v. Employment Sec. Bd. of Review, 108 R.I. 177, 273 A.2d 670 (1971). In *Waite*, the claimant obtained a disability award after a court battle, yet the attorney's request for fees, based on § 28-44-57(c) of the General Laws of Rhode Island, was denied, since that statute authorizes an award of attorney fees only if an unemployment insurance claim is litigated. The applicable statute for disability awards (§ 28-41-31) allowed a reasonable attorney fee, but did not specify that it be paid by the state. Whether resulting from a desire to keep attorneys out of administrative proceedings, or a decision to save the state money, or a refusal by a court to deal with legislative oversight, this unfortunate outcome discourages representation by attorneys.

Melvin L. Bellar, general counsel for the Louisiana Division of Employment Security, has noted that even in states making provision for payment of fees, claimants do not appear to have been greatly assisted in obtaining representation. This lack of representation is attributed to the general apathy of the bar and a failure on the part of the respective agencies to acquaint attorneys and the public with the pertinent statutory provisions. Bellar, *supra.*

35. Bellar, *supra* note 34, at 5; *see* NEB. REV. STAT. § 48-646 (1968).

36. CAL. WELF. & INST'NS CODE § 10962 (West 1972).

hourly rate, without consideration for the contingent nature of the litigation. Court-awarded fees are paid directly to the attorney; however, legal process is not available to compel additional payment out of the award for work performed at administrative levels.[37]

4. *Social Security Benefits.* The Social Security Administration uses the most intricate system for determining the award of attorney's fees. Any fee, whether contingent or hourly, must ultimately be approved by the administration or the courts.[38] For services resulting in a judicial decision for a claimant, the statute allows the payment of reasonable fees, limited to a maximum of 25 percent of the total past due benefits.[39]

Curiously, the administration's discretion in awarding fees is far greater than that of the federal courts. Attorneys' fees for representation at administrative levels are not subject to any absolute limit; however, only 25 percent of the past due benefits may be paid directly to the attorney.[40] A petition must be filed with the agency which includes an itemization of services, the dates services began and ended, the amount of fee desired, and the amount and itemization of expenses.[41] The petition must be sent to the claimant, who has the right to object to the amount requested by the attorney.[42] The petition is then evaluated according to the purpose of the program, that of providing a measure of economic security for its beneficiaries. In addition, the administration considers the nature of the services performed, the complexity of the case, the level of skill and competence required to render services, the amount of time spent on the case, the result achieved, the level of administrative review to which the claim was carried, the level of review at which the representative entered the proceedings, and the amount of the fee requested, excluding expenses.[43]

In sharp contrast to the grudging treatment of attorneys under the

37. *See id.* § 11002.

38. 42 U.S.C. § 406 (1970).

39. *Id.* § 406(b)(1). *Compare* Ray v. Gardner, 387 F.2d 162, 165 (4th Cir. 1967), *with* Webb v. Richardson, 472 F.2d 529, 537 (6th Cir. 1972). In *Ray* the court overturned a district court's award of attorneys' fees covering both judicial and administrative proceedings, holding a court had no jurisdiction to award fees for the latter. The *Webb* court held that the final tribunal which upholds the claim for benefits may award up to 25% of past due benefits for costs of all services performed by an attorney in securing the benefits. *Cf.* McDaniel v. Cohen, 288 F. Supp. 808, 812 (W.D. Va. 1968).

40. 42 U.S.C. § 406(a) (1970).

41. 20 C.F.R. § 409.976(a) (1974).

42. *Id.* § 404.976(a)(7).

43. *Id.* § 404.976(b).

Veterans' Act,[44] courts have acknowledged the need to compensate adequately attorneys representing social security claimants.

> Availability of lawyers to [social security] claimants is of the highest importance . . . . Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.[45]

A district court judge posited the problem of reasonable attorney fees in cases involving social security benefits in the following manner:

> Surely an attorney is entitled to a reasonable fee for services rendered his client in prosecuting a claim in this court, and it is as much the court's responsibility to see that a reasonable and adequate fee is paid to claimant's attorney, as it is to see that such attorney does not receive an unreasonably large or unconscionable fee for his services . . . . [T]o refuse to allow a claimant's attorney a reasonable and adequate fee for his services rendered within the limits prescribed by the Act . . . would make it exceedingly difficult, if not impossible, for many deserving claimants to obtain proper legal representation to pursue and prosecute their deserving and legitimate claims in the District Court after they had been arbitrarily denied by the Secretary and his minions.[46]

5. *Workmen's Compensation.* In California, attorneys are entitled to reasonable fees set by the Workmen's Compensation Commission.[47] Most importantly, since fees can be paid directly to the attorney in the full amount awarded by the commission,[48] collection problems are minimal. Fees are reviewable by the courts, which have noted that a reasonable fee should not be less than is customarily awarded for comparable services nor should they be so low as to discourage competent attorneys from accepting compensation cases.[49] Thus, the workmen's compensation statutes in California acknowledge that attorneys will practice only in areas offering remuneration similar to that which can be earned in nonregulated fields. The contrasting lack of attorney representation in social security, supplemental income, unemployment compensation, or welfare cases may well be due to the failure of statutory craftsmen to recognize the necessity of an adequate financial incentive.

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44. See text accompanying notes 25-31 *supra.*

45. McKittrick v. Gardner, 378 F.2d 872, 875 (4th Cir. 1967).

46. Mauldin v. Gardner, 264 F. Supp. 370, 372 (D.S.C. 1967).

47. *See* CAL. LABOR CODE §§ 4903(a), 4906 (West 1971).

48. *Id.* §§ 4903(a)-04.

49. Bentley v. Industrial Acc. Comm'n, 75 Cal. App. 2d 547, 171 P.2d 532 (1946).

Suggestions for Improvement of Legislation Regulating The Attorney-Client Relationship

Even though legal skills are essential in an administrative context, attorneys often practice under the delusion that the administrative agency is a helpmate rather than an adversary. The author has reviewed numerous transcripts for appeal which indicated that an attorney, who never would have prepared a personal injury case with so little care, improperly assessed his role as an advocate. Often such a case is handled perfunctorily as a favor to a client, because an attorney believes he will not be paid adequately if he spends the time to prepare thoroughly. Such a system performs a disservice both to the client and to the attorney. In many such instances, even the use of a paraprofessional would inadequately serve the client, since the skills of an attorney are required. It is these skills which must be made available at a price the client can afford.[50]

The obvious reason for the reluctance of attorneys to litigate claims for veterans' benefits is the statutory limit on attorneys' fees. Not only should the maximum fee be raised to encourage attorney involvement, but also, to make the addition of counsel meaningful, judicial review of veterans' claims should be permitted.[51]

Veterans are represented presently by veterans' service organizations. These organizations are so closely related to the administration, with personnel often moving between the agency and the organizations, that they tend to act as processing agents rather than as advocates.[52] In this author's experience, veterans' organizations assist with ministerial details, such as the completion of forms, but they do not perform the advocate's role of pursuing uncertain claims. Numerous denials of apparently meritorious claims belie any contention that the existing system is satisfactory.[53]

50. Noncommercial administrative claims impose even greater demands on the attorney than does the ordinary civil action. In the typical social security case, for example, once the initial application and reconsideration stages are completed, settlements are not permitted and an administrative appeal or trial is inevitable. The attorney's time involvement is therefore necessarily more extensive when litigating administrative claims than when arguing personal injury cases.

51. 38 U.S.C. § 211(a) (1970). At present a finding by the administration of any law or fact in benefit cases is final.

52. *Hearings on Legal Fees, supra* note 4, at 463-64, 504, 518 (statements of Harold J. Nussbaum & Raymond T. Bonner). For arguments by these service organizations in favor of continuing the existing system, see *id.* at 495-504 (statement of Charles E. Mattingly & Edward Golembieski, American Legion).

53. *See id.* at 513-14 (statement of Raymond T. Bonner).

In connection with unemployment insurance compensation claims, the author has had a sufficient number of requests for representation to believe that a significant percentage of claimants would be willing to employ an attorney on a contingent basis after an initial denial of benefits. The single most important deterrent to the author's representation of such claimants has been the lack of protection against the ungrateful client, who refuses to pay regardless of the efforts undertaken by the attorney or the result achieved.

Unfortunately, even honest clients will find it difficult to obtain counsel in unemployment insurance cases, since attorneys cannot differentiate with any certainty the client who will keep his word from the client who will not. The ungrateful client exists at all income levels and stations of life; his appearance and actions are not necessarily different from those of the honest client. Faced with an unemployment insurance claim, knowing that the client is in need of insurance proceeds, the attorney is justifiably skeptical of promises of payment on a contingent basis, because he has no remedy if the client refuses to pay. The result is a rejection of all such cases.

The unemployment insurance compensation system should be modified to allow attorney liens for reasonable fees. One method would be to require the attorney to register a fee agreement with the administrative agency and to allow him to be paid directly from the proceeds in accordance with the agreement. A difficulty with contingent agreements in administrative claims is that the amount at stake often cannot be predicted with any accuracy. While a claim is filed for a stated amount, disqualification of some of the period for which a claimant seeks compensation may result in a smaller ultimate award. The attorney, unable to compute the exact amount at stake, will protect himself under the present system by demanding a high percentage of the proceeds. Assuming a benevolent administration, the better system would be to provide the agency with the authority to review fees and to pay reasonable fees according to the particular case.

The problems of uncertain and uncollectable fees for legal services with respect to social security claims are less severe. For work performed at administrative levels, the Social Security Administration will allow a reasonable fee; however, only 25 percent of the past due benefits may be certified for direct payment to the attorney.[54] Although this protection is often adequate, a single financial loss may discourage further practice in this area, since the margin of profit on a

54. 42 U.S.C. § 406(a) (1970).

successful case is slight. In addition, an attorney can frequently win a case and yet be protected for only a negligible sum, because the back award is extremely small. This result is common either when the client is a marginal wage earner or when the onset date of disability permits only a modest award. In such cases, 25 percent of the award is unfair compensation for an attorney who has created a fund which continues throughout the client's life.[55]

The social security system's provision for attorney fees is, on the whole, commendable. Although some attorneys have objected to filing a petition for fees as insulting,[56] the petition is necessary, given the danger of overcharging clients for administrative work. Although various factors account for the amount of the fee,[57] awards are usually set at a reasonable per hour rate. Unfortunately, this standard of remuneration does not account for those claims which are not successful or which, although rewarding for the client, do not adequately compensate the attorney. Moreover, while attorneys must offer a reasonable percentage to the client in order to achieve the understanding requisite to a proper attorney-client relationship, even a 40 percent maximum can generate losses where the retroactive award is small.

Just as the limitation on the amount that may be certified for direct payment for services at the agency level should be abolished, the 25 percent limitation on fees for litigation in the federal courts ought to be removed. Again, the difficulty with the limitation is that the attorney is unable to predict the amount of the retroactive award. Congress probably assumed 25 percent would be sufficient because the time between initial application and petition to the district court, after exhaustion of administrative remedies, is quite lengthy. The onset date of disability, however, is not always what is claimed; it may be set forward in the process of adjudication. The result is that the client becomes entitled to benefits for life, but the attorney, who is paid only out of the back award, gets very little for his efforts. Insofar as fixed percentages create arbitrary results, the wiser approach would be to allow courts discretion in awarding attorneys' fees.

Personal injury cases attract attorneys because large recoveries

55. The limitation also creates a conflict of interest by rewarding the attorney who delays his case and thereby creates a larger back award. Webb v. Richardson, 472 F.2d 529, 537 (6th Cir. 1972), *quoting* Blakenship v. Gardner, 256 F. Supp. 405, 410 (W.D. Va. 1966).

56. *Hearings on Legal Fees, supra* note 4, at 1724 (letter of James H. Coleman); *see* 20 C.F.R. § 404.976 (1974).

57. See text accompanying notes 41-43 *supra.*

compensate for cases that are lost. Society benefits because the contingent fee allows the attorney to take a chance on doubtful claims. An attorney who has not lost a case is probably not accepting enough difficult cases to benefit those who most need his services. Objection may be raised, however, to large windfalls to attorneys who settle a personal injury claim with apparently little effort. This criticism may be valid with respect to personal injury cases, but there are no settlements of administrative claims. The attorney is most often paid according to time expended; thus, if only one out of ten cases is lost, the lawyer may suffer a net loss. The agency should therefore take into account the nature of the attorney-client relationship and the particular attorney's practice. To encourage development of expertise, lawyers regularly engaged in administrative practice should be entitled to share in high awards. Normally, past-due benefits are not large unless there has been a series of denials. Overcoming such administrative adversity is a tribute to the attorney's skill; therefore, recognition of the contingent nature of representation should also take into account the attorney's skill. In cases where the attorney's fee on a per hour basis would not consume more than 25 percent of the award, additional compensation could easily be awarded, since the client would be left with a fair share of the proceeds of litigation.[58]

Another difficulty which discourages attorneys from litigating claims for governmental benefits is delay in payment. The processing of social security claims takes a considerable amount of time, but this delay may benefit clients. But for this time lag, impairments often would not be verifiable medically by the hearing date. Hence, if the processing period were shortened, claimants might be barred from refiling under res judicata principles, even though new evidence of disability is available.

At the hearing level, the client normally receives an award from the Social Security Administration 90 days after a favorable decision. The attorney can then petition for his fees.[59] The petition cannot be made earlier, both because the amount involved is unknown[60] and be-

58. Even in cases where the claimant is under an obligation to repay his retroactive award to the claimant's disability insurer, the administration will neither honor the attorney-client agreement nor recognize the contingent nature of the representation. Surely an insurance company does not need economic protection against attorneys.

59. The attorney is authorized to petition for fees on completion of the proceedings in which he represented a client. 20 C.F.R. §§ 404.975(b)-.976 (1974).

60. The agency determines the amount to be awarded after a favorable decision is rendered. *Id.* §§ 404.968-.969.

cause the agency acting through the Appeals Council has 90 days within which to review an adverse decision.[61] After the attorney submits the petition, there is an additional delay of 60 to 180 days during which the fee request is reviewed: this total delay of 150 days to 270 days before payment, after the bulk of the work is completed, renders it difficult to practice economically, particularly since the waiting period seems to be greatest when the award is high. To encourage adequate representation, the post award delay in payment of attorney fees should be drastically reduced.

Consideration could also be given to a requirement that the government bear the cost of attorneys' fees in litigation which results in the award of benefits. If the agency has erroneously determined that a claimant is not entitled to benefits, justice is not served when the claimant is forced to pay counsel to right a wrongful act of the government.[62] Although our system of justice has traditionally been based on the notion that each party will bear his own attorneys' fees,[63] an exception should perhaps be made when the state has denied a legitimate claim of entitlement.[64]

It seems needless, however, to force the government to bear costs for the vast majority of litigants who are able to pay attorneys from the proceeds of litigation. At present, legal aid offices handle a significant share of welfare and social security claims.[65] The fact that society must bear the costs of legal aid seems inappropriate, since, with slight modifications in the existing structure, claimants could absorb legal costs.[66]

61. *Id.* § 404.947. If a decision adverse to the agency is rendered in district court, the length of the waiting period is affected by various factors, such as whether the case is to be remanded, whether the attorney represented the client at only the judicial proceeding, or whether the attorney invested a substantial amount of time at the administrative level.

62. Bellar, *supra* note 34, at 4-5.

63. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 793 (1966). Were the loser invariably to bear the winner's attorney's fees, low-income parties would be discouraged from instituting most litigation, particularly claims involving any degree of risk. *See also* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 637-55 (1974).

64. Bellar, *supra* note 34, at 6.

65. *See* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 682 (1974), in which it is indicated that the caseload of the present legal aid system prevents those offices from adequately representing many clients. The authors suggest that awards of fees to legal aid offices would remedy this situation; however, at least with respect to governmental benefit claims, this remedy would be unnecessary, if the restrictions on access to private attorneys were removed.

66. There is, however, one major exception: Medicare claims. Such claims involve too small an amount of past due benefits to support the use of a private attorney. The present backlog of cases prevents legal aid societies from assisting most Medicare

Legal aid would be a proper alternative only when the amounts involved will not support employment of a private attorney,[67] such as when the award is small, or when a new principle of law is involved which would entail litigation prohibitively expensive for the use of private attorneys.

Conclusion

Attorneys practice their profession at a profit. So long as attorneys can, under the laws of supply and demand, earn more in particular areas of the law, those areas will be greatly favored. If society is truly concerned with the quality of legal representation of the poor, then changes in the existing statutes governing nonbusiness administrative claims are necessary in order to bring that system into conformity with the basic economic principles at work in the legal profession.

At present, attorneys are infrequently employed in this field of litigation because of statutory oversight with respect to the two most important business aspects of the legal profession—the adequacy and collectability of fees. Attorneys' fees in welfare, social security, supplemental income, veterans' administration, and unemployment insurance cases could be made competitive with fees in other areas at little real cost to the claimant. Since an attorney's services can greatly enhance the probability of obtaining an award, it is in the claimant's economic self-interest to retain counsel even at the expense of a substantial contingent fee. The present system not only protects claimants against excessive fees, but also interferes with the freedom to choose whether to employ an attorney. Without this freedom, protection against the overreaching attorney is needless and the right to redress is lost.

claimants. Public subsidy of such cases could facilitate employment of private attorneys. For example, claimants could be required to pay up to 40% of an award, with the federal government providing the balance of the legal fees, which would be determined according to a reasonable per hour rate of compensation.

67. The minority of cases, where insufficient amounts are involved, could also be treated as small claims matters.